IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
May 10, 2006 Session

STATE OF TENNESSEE v. RAMIE ANDERSON AKA JAMIE ANDERSON

Direct Appeal from the Circuit Court for Grundy County
No. 3464-B Thomas W. Graham, Judge

No. M2005-02086-CCA-R3-CD - Filed August 17, 2006

The defendant, Ramie Anderson,[1] was convicted of aggravated burglary and theft over $1,000. See Tenn. Code Ann. §§ 39-14-403, -103 (2003). The trial court imposed sentences of five years and six months for the aggravated burglary and four years for the theft over $1,000. The defendant was ordered to serve six months in jail for the theft and twelve months for the aggravated burglary, a total of eighteen months. The remainder of the sentences were ordered to be served concurrently on probation. In this appeal as of right, the defendant argues that the trial court erred by refusing to suppress evidence seized from his residence and contends that the remaining evidence is insufficient to support the convictions. Because the trial court erred by its refusal to suppress, the judgments of the trial court are reversed and remanded for a new trial.

Tenn. R. App. P. 3; Judgment of the Trial Court Reversed and Remanded

GARY R. WADE, P.J., delivered the opinion of the court, in which JERRY L. SMITH and ALAN E. GLENN, JJ., joined.

Paul D. Cross, Monteagle, Tennessee, for the appellant, Ramie Anderson.

Paul G. Summers, Attorney General & Reporter; Brent C. Cherry, Assistant Attorney General; J. Michael Taylor, District Attorney General; and Steven Strain, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

On March 23, 1999, the victim, Danny Layne, returned home from work and discovered that his residence had been burglarized. At trial, he testified that a side door to his garage was "tore all to pieces" and that his truck, four-wheeler, welder, air tools, hydraulic jacks, and air tanks had been stolen. He also testified that the back door to his residence was pried open and that several guns,

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[1] The defendant's name also appears in the record as Raymond L. Anderson. It is the policy of this court to use the name found in the indictment.

including an antique gun from the 1800s, some old coins, cash, a portable compact disc player, and over one hundred compact discs had been taken from his property. Some of the tools and compact discs were recovered. The truck was burned. Later, when the victim's son, Jackie Layne, confessed to his participation in the burglary, the victim "disowned him" and forced him to turn himself in to the police. The son, who eventually pled guilty to burglary, informed the victim where he and the others involved in the crime had sold some of his possessions.

Jackie Layne, who was a witness for the state, testified that on the day of the burglary, he, Josh Shrum, and the defendant, after ingesting methamphetamine, began to discuss ways to obtain money in order to purchase ingredients to make more of the illegal drug. He recalled that he informed Shrum and the defendant about the "nice things that [his] dad had and how [they] could probably get a lot of money." According to Jackie Layne, the three men traveled to the victim's residence, pried open the back door with a crowbar, and stole guns, compact discs, and coins from the residence. He stated that they also took the victim's truck, which was loaded with a four-wheeler, a battery charger, and several tools from the garage. Jackie Layne testified that he and the defendant sold all of the tools for a total of $400. When the defendant tried to hide the truck in a remote area and got stuck in some mud, he and Shrum burned the vehicle. Jackie Layne described himself as distraught, explaining that "drugs [were] messing with [his] head . . .[,] and [he] just wanted to see [his father] and make sure he was all right." He eventually turned himself in to the police and implicated the two other men in the burglary.

Glendon Ferrell Hicks, the chief of police for the city of Gruetli-Laager, investigated the burglary, compiled a list of missing items, and checked for fingerprints. He testified that after signing an affidavit for a warrant to search the defendant's residence and obtaining a warrant from a magistrate, he and the sheriff drove to the residence. He explained that he chose not to serve the document when the defendant's brother voluntarily handed over several of the stolen compact discs. Chief Hicks recalled that the victim later identified the compact discs as a portion of those stolen from his residence.

On cross-examination, Chief Hicks acknowledged that he and the sheriff obtained the search warrant for the defendant's residence based upon his affidavit. He conceded that when he arrived at the defendant's residence around 2:00 a.m., the sheriff, who had the document in his hand, "told the boy that came to the door [that] he had [the warrant]" and that afterward they were given eight of the stolen compact discs, which were listed on the return. Questioned about who actually obtained the warrant and who filed the return, the chief stated, "[The sheriff] served the search warrant. . . . I didn't serve the search warrant."

Later in the trial, during a jury-out hearing on an unrelated issue, the trial judge observed, "I think we have to take the position that they did a search, it may have been a sloppy search, it may not have been a good search, but they did a search, because they made a return."

After entering into the record the search warrant, which included the return prepared by the executing officers, the defense rested.

I.

In this appeal, the defendant contends that the trial court erred by denying his motion to suppress. Specifically, he argues that the affidavit in support of the search warrant was insufficient. Although the state concedes that the affidavit was insufficient, it argues that the evidence was admissible because it was voluntarily surrendered without a search of the residence.

A.

The substantive portion of the affidavit provided by Chief Hicks in support of the search warrant provides as follows:

> On the 24 day of March 1999, I received information from John Doe/Alias a confidential informant, whom I have known for at least eight years (8) and whom I know to be honest, reliable and credible. In addition to the said informant he has given reliable information to me and other law enforcement officers which has resulted in arrest and convictions of the individuals involved in the illegal possession of stolen property and have resulted in the seizure of contraband, vehicles associated with the possession of stolen property.
>
> The aforesaid informant advised me that he/she had been on premises of [the] defendant, within seventy two (72) hours preceding the 25 day of March 1999, and while on the said premises he/she had personally observed one 38 S&W 4in brl nickle plat[e,] one 38cal S&W 4in brl blue steel, one Rossi 22cal pump rifle, one Westerfield single shot 22cal rifle and Schummalker battery charger SE 2001, 50 asst CD, on the said premises which are under the control of said . . . defendant. The said premises are located in Grundy County, Tennessee . . . .
>
> Wherefore, as such officer acting in performance of my duty in the premises I pray the Court issue a warrant authorizing the search of the said premises described in Exhibit "A," of the said person of the defendant and of the house or buildings and vehicles on the said premises for evidence of the crime of the Possession of stolen property, and such search be made either by day or night.

At the pre-trial hearing, defense counsel argued that the affidavit failed to establish probable cause that any of the items enumerated were evidence of or had any connection to any criminal activity. The trial court ruled as follows:

> The combination of the warrant and the affidavit taken together . . . establishes that an impartial magistrate knew what was being asked for and based on what she says was a sworn statement of Chief Glendon Hicks, that it was stolen, that that's sufficient. It is not the best way to have done it, but I think the bottom line is she issued a warrant based on Glendon Hicks telling her that he had an informant on stolen property, that had seen stolen property in the home and they may have left the word stolen property out in the affidavit, but, I mean, you could draw that assumption from it.

The standard of review applicable to suppression issues is well established. When the trial court makes a finding of facts at the conclusion of a suppression hearing, the facts are accorded the weight of a jury verdict. State v. Stephenson, 878 S.W.2d 530, 544 (Tenn. 1994). The trial court's findings are binding upon this court unless the evidence in the record preponderates against them. State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996); see also Stephenson, 878 S.W.2d at 544; State v. Goforth, 678 S.W.2d 477, 479 (Tenn. Crim. App. 1984). Questions of credibility of witnesses, the weight and value of the evidence, and resolution of conflicts in evidence are matters entrusted to the trial judge as the trier of fact. The party prevailing in the trial court is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from the evidence. Odom, 928 S.W.2d at 23. This court's review of a trial court's application of law to the facts, however, is conducted under a de novo standard of review. See State v. Walton, 41 S.W.3d 75, 81 (Tenn. 2001); State v. Crutcher, 989 S.W.2d 295, 299 (Tenn. 1999).

An affidavit is an indispensable prerequisite to the issuance of any search warrant. Tenn. Code Ann. § 40-6-103; State ex rel. Blackburn v. Fox, 292 S.W.2d 21, 23 (Tenn. 1956). It must establish probable cause. Tenn. Code Ann. § 40-6-104; Tenn. R. Crim. P. 41(c). Probable cause has been defined as follows:

> Whether at [the] moment [of arrest] the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed . . . an offense.

Beck v. Ohio, 379 U.S. 89, 91 (1964).

Also fundamental to the issuance of a search warrant is the requirement that the issuing magistrate make an independent determination that probable cause exists. See State v. Moon, 841 S.W.2d 336, 337 (Tenn. Crim. App. 1992). Because the magistrate must make an independent inquiry, it is imperative that the affidavit contain more than conclusory allegations. "'Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police.'" Id. at 338 (quoting United States v. Ventresca, 380 U.S. 102, 109 (1965)). "In Tennessee, a finding of probable cause supporting issuance of a search warrant must be based upon evidence included in a written and sworn affidavit." State v. Henning, 975 S.W.2d 290, 294 (Tenn. 1998) (citing Tenn. R. Crim. P. 41(c); State v. Jacumin, 778 S.W.2d 430, 432 (Tenn. 1989)); see Tenn. Code Ann. § 40-6-104 (2003).

Here, the affidavit merely recites a list of items seen in or around the defendant's residence. The claim that there were guns, a battery charger, and several compact discs on the property is not accompanied by any explanation as to how these items related to the Layne residential burglary or any other criminal activity. The trial court inferred from the context of the affidavit that the magistrate who issued the warrant understood that the items in question were stolen. Chief Hicks

had asserted that the informant had provided information in the past which led to the convictions of "individuals involved in the illegal possession of stolen property." The final paragraph in the affidavit indicates that Chief Hicks had applied for the warrant in order to search "for evidence of the crime of [p]ossession of stolen property." These statements imply that the listed items might be stolen property. That is not enough, however, under our law. See Earls v. State, 496 S.W.2d 464, 465 (Tenn. 1973) ("Mere affirmance of belief or suspicion is not enough."). An affidavit must include a recital of the underlying circumstances that would permit a magistrate to act independently in assessing the existence of probable cause. See Ventresca, 380 U.S. at 109; Moon, 841 S.W.2d at 338; see also Henning, 975 S.W.2d at 432. Here, there is no indication that the items described by the informant were consistent with the description of the items taken from the victim. The document failed to establish a nexus between the crimes against the victim and the place to be searched. As conceded by the state, the affidavit in support of the search warrant did not establish probable cause and was, therefore, improperly issued.

B.

The state, however, maintains that the validity of the search warrant is not relevant because the physical evidence was not seized pursuant to a search. It asserts that the evidence at issue was "voluntarily surrendered." Initially, the record contains little evidence with regard to the voluntariness of the delivery of the stolen items to the police. In fact, the only pertinent testimony is that of Chief Hicks:

[State]:	And when you got to [the defendant's residence], Chief, did you all actually serve the search warrant?
[Chief Hicks]:	No, sir. When we got inside the house there was a gentleman there that . . . said he was this gentleman's brother and . . . told us that [the defendant] had brought some CDs
. . . .	
[State]:	And that person gave you some CDs?
[Chief Hicks]:	Yes, sir, gave them to [the sheriff].

On cross-examination, Chief Hicks testified as follows:

[Defense Counsel]:	Officer Hicks, you said something about not executing, or maybe that's not the word you used, the search warrant, is that correct?
[Chief Hicks:]	Yes, sir.
[Defense Counsel]:	Well, are you saying that you did not display the search warrant when you got to the door of the house?
[Chief Hicks]:	I didn't have the search warrant.
[Defense Counsel]:	But you showed up at the same - - you're the one that actually went and got the search warrant, aren't you?
[Chief Hicks]:	I went down here with [the sheriff] and got the search warrant.
. . . .	

[Defense Counsel:]	And then are you saying you don't know whether the search warrant was or was not presented when you showed up at the house at 2 o'clock in the morning over at the [defendant's] house?
[Chief Hicks]:	No, sir, I said I didn't present. You asked me did I present it. I said I didn't present it.
[Defense Counsel:]	Did you see anyone else present it?
[Chief Hicks]:	[The sheriff] had it and told the boy that came to the door he had it, yes.
[Defense Counsel:]	Okay. And I assume showed it to him?
[Chief Hicks]:	Well, he could see it in his hand.
. . . .	
[Defense Counsel:]	Okay. Have you - - will you take a look at the search warrant return and confirm that this is the return on that search warrant?
[Chief Hicks]:	No, sir, I sure can't, because I didn't get the return.
. . . .	
[Defense Counsel:]	Do you know who filed the return on the search warrant?
[Chief Hicks]:	No, sir, I don't.
. . . .	
[Defense Counsel:]	Even though you're the one that got it?
[Chief Hicks]:	Well, I was the one that signed the affidavit. I didn't get the search warrant. [The sheriff] served the search warrant. . . . I didn't serve the search warrant.

During a jury-out hearing on an unrelated issue, the trial court determined that the search warrant had indeed been executed, observing "that they did a search, it may have been a sloppy search, it may not have been a good search, but they did a search, because they made a return." The trial court specifically found that the search was not voluntary:

> Here's the way I would have analyzed it at the time [of the pretrial hearing on the motion to suppress], I'd analyze it now, given the choice between a voluntary admission and a somewhat weak search warrant, I would take the voluntary admission every time . . . so I would have announced that, so I don't think I found that. I don't think I found that or I wouldn't have relied on something that honestly has some weaknesses to it that may or may not be fatal.

The record of the pretrial hearing confirms that assessment. The trial court simply ruled that the affidavit was sufficient.

Chief Hicks ultimately admitted that the sheriff "served the search warrant." "It is a rule of law in Tennessee that contradictory statements by a witness in connection with the same fact cancel each other." State v. Matthews, 888 S.W.2d 446, 449 (Tenn. Crim. App. 1993). "[I]f the proof of [a] fact lies wholly with one witness, and he both affirms and denies it, and there is no explanation, it cannot stand otherwise than unproven." Id. at 450 (quoting Johnson v. Cincinatti, N.O. & T.P.

R.Y. Co., 240 S.W. 429, 436 (Tenn. 1922)). Here, the testimony is contradictory. Also, the state stipulated that the return was on file in the clerk's office. Eight compact discs were listed as having been seized from the residence pursuant to the search authorized by the issuance of the warrant. Thus, the warrant must be considered as having been executed on the premises.

The only authority cited by the state is Neal v. State, 283 S.E.2d 671 (Ga. Ct. App. 1981), where, after the defendant's arrest, a detective was invited by the defendant's brother-in-law to come to his house. Upon his arrival, the detective had asked the defendant's sister if the defendant ever wore a red hat, at which point she went to a back room and returned with a red hat, a knife, and a pair of gloves. This evidence was used to convict the defendant. The Georgia appellate court held that the officers did not conduct a search. It ruled that the evidence was voluntarily provided to the officers.

Similarly, in Bays v. State, 529 S.W.2d 58 (Tenn. 1975), the wife of the defendant arrived as her husband was being arrested for robbery. Another participant in the robbery was with the defendant's wife at the time. These two individuals led an officer to the defendant's residence where the co-defendant located a watch that had been taken in the robbery. Shortly thereafter, the defendant's wife took a gold necklace from inside the residence and handed it to the officer. Although the watch was ruled inadmissible, our supreme court concluded that the officer did not conduct a search of the residence with respect to the necklace retrieved by the defendant's wife. Bays, 529 S.W.2d at 61.

"[M]ere acceptance by officers of that which a defendant turns over to them voluntarily is not 'a search' within the purview of the Fourth Amendment." United States v. Strouth, 311 F.Supp. 1088, 1093 (E.D. Tenn. 1970); see United States v. Frazier, 936 F.2d 262 (6th Cir. 1991); cf. Dortch v. State, 517 S.W.2d 24, 26 (Tenn. Crim. App. 1974) and Williams v. State, 506 S.W.2d 193, 197 (Tenn. Crim. App. 1973) (holding that collection of abandoned property is likewise not a "search" as contemplated in the Fourth Amendment). Neal and Bays, however, are factually distinguishable from the case at issue. In neither case did the police make the existence of a search warrant known, see Earls, 496 S.W.2d at 467, or even initiate contact with those who provided the evidence.

It is well settled that a search conducted pursuant to a voluntary consent is an exception to the requirement that searches and seizures be conducted pursuant to a warrant. State v. Bartram, 925 S.W.2d 227, 230 (Tenn. 1996) (citing Schneckloth v. Bustamonte, 412 U.S. 218, (1973)). The validity of the search of the defendant's residence depends on whether, based on the totality of the circumstances, the consent was voluntary. See Schneckloth, 412 U.S. at 227; Liming v. State, 417 S.W.2d 769, 770 (1967). "To pass constitutional muster, consent to search must be unequivocal, specific, intelligently given, and uncontaminated by duress or coercion." State v. Brown, 836 S.W.2d 530, 547 (Tenn. 1992). "[A] warrantless search or seizure is presumed to be unreasonable, and the resulting evidence is subject to suppression unless the [s]tate demonstrates that the search was conducted pursuant to one of the narrowly defined exceptions to the warrant requirement," such as a voluntary consent. State v. Vaughn, 144 S.W.3d 391, 403 (Tenn. 2003). "Consent to enter and search a home will not be lightly inferred, nor found by mere acquiescence to unlawful authority."

State v. Clark, 844 S.W.2d 597, 599 (Tenn. 1992). The following factors have been used when evaluating the voluntariness of the consent:

(1) time and place of the encounter;
(2) the presence of coercive police procedures;
(3) whether the encounter was in a public or secluded place;
(4) the number of officers present;
(5) the degree of hostility;
(6) whether weapons were displayed;
(7) whether consent was requested; and
(8) whether the consenter initiated contact with the police.

State v. Cox, 171 S.W.3d 174, 185 (Tenn. 2005); State v. Carter, 16 S.W.3d 762, 769 (Tenn. 2000); see United States v. Ivy, 165 F.3d 397, 402 (6th Cir. 1998). Although each of the factors is relevant, no single factor is dispositive and this list does not represent all factors that may be relevant to the issue of voluntariness. See Carter, 16 S.W.3d at 769. Personal characteristics of the individual giving consent may also be considered, including age, education, intelligence, maturity, sophistication, experience, prior contact with law enforcement personnel, and prior cooperation or refusal to cooperate with law enforcement personnel. Cox, 171 S.W.3d at 185 (citing 79 C.J.S. Searches and Seizures § 119 (2006)). "Knowledge of the right to refuse consent has also been included as a factor." Id. (citing Schneckloth, 412 U.S. at 235-47).

In Earls, our supreme court addressed whether a search could be justified as lawful on the basis of consent when that "consent" was given only after an officer asserted that he possessed a warrant. In its analysis of Bumper v. North Carolina, 391 U.S. 543 (1968), our high court held that there was no "blanket prohibition that no consent can ever be given where an invalid warrant is involved." Earls, 496 S.W.2d at 466. "[I]t is possible to give valid consent to search even after the existence of the warrant is made known, but the [s]tate must show by clear and convincing evidence that the consent is not based upon the warrant and was not coerced by other factors." Id. at 467. "[T]he [s]tate would bear the burden of showing that the consent was sufficiently independent of the warrant to remove the taint of its coercive nature." Id. "The burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." Id.

At trial, Chief Hicks testified that he accompanied the sheriff to the defendant's residence at approximately 2:00 a.m. after they had obtained a search warrant. The chief recalled that when he and the sheriff entered the defendant's house, the sheriff, who held the document in full view, informed the defendant's brother that he had a warrant. The items included on the search warrant return were the very items taken from the defendant's residence. They were the only stolen items presented at the trial of the defendant. The state did not present any further evidence to establish that the defendant's brother voluntarily consented to the search. Nothing in the record indicates the defendant's brother's age, his level of intelligence, his prior contact with law enforcement personnel, or his knowledge of his right to refuse consent. It is our view that the state has failed to demonstrate

by clear and convincing evidence that the consent was not based upon the warrant. See Earls, 496 S.W.2d at 467. The evidence seized during the search, therefore, must be suppressed.

II.

The defendant also asserts that the evidence seized during the search is the only evidence implicating him in the crime other than the testimony of Jackie Layne, a co-defendant. He argues that the evidence is, therefore, insufficient to support either conviction.

On appeal, of course, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted to the jury as the trier of fact. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). When the sufficiency of the evidence is challenged, the relevant question is whether, after reviewing the evidence in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992).

In Tennessee, it is well established that a conviction may not be based solely upon the uncorroborated testimony of an accomplice. State v. Bough, 152 S.W.3d 453, 464 (Tenn. 2004) (citing State v. Bane, 57 S.W.3d 411, 419 (Tenn. 2001); Monts v. State, 379 S.W.2d 34, 43 (Tenn. 1964)).

> [T]here must be some fact testified to, entirely independent of the accomplice's testimony, which, taken by itself, leads to the inference, not only that a crime has been committed, but also that the defendant is implicated in it; and this independent corroborative testimony must also include some fact establishing the defendant's identity. This corroborative evidence may be direct or entirely circumstantial, and it need not be adequate, in and of itself, to support a conviction; it is sufficient to meet the requirements of the rule if it fairly and legitimately tends to connect the defendant with the commission of the crime charged. It is not necessary that the corroboration extend to every part of the accomplice's evidence. The corroboration need not be conclusive, but it is sufficient if this evidence, of itself, tends to connect the defendant with the commission of the offense, although the evidence be slight and entitled, when standing alone, to but little consideration.

Hawkins v. State, 469 S.W.2d 515, 520 (Tenn. 1971); see Bough 152 S.W.3d at 464; State v. Bigbee, 885 S.W.2d 797, 803 (Tenn. 1994).

State v. Longstreet, 619 S.W.2d 97, (Tenn. 1981), however, mandates that when conducting a sufficiency of the evidence review following a finding of erroneous admission of some evidence, the appellate court should conduct the sufficiency review based on the inclusion of the erroneously admitted evidence. As stated in Longstreet, the rule of conducting a sufficiency review with the inclusion of the erroneously admitted evidence is based on two considerations:

> First, it is impossible to know what additional evidence the government might have produced had the faulty evidence been excluded at trial or what theory the government might have pursued had the evidentiary ruling of the trial court been different. A rule which would require the government to introduce all available evidence and assert every possible legal theory in anticipation of appellate reversal of trial court rulings would unduly prolong and clutter the original trial. Second, there is a risk that appellate courts would be less zealous in protecting the pretrial and trial rights of the accused if they knew reversal of a trial court's ruling would bar further prosecution.

619 S.W.2d at 101.

Our supreme court has adopted the United States Supreme Court's distinction between reversals based on trial error and those based on insufficient evidence:

> In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished. (emphasis supplied)

Id. (quoting Burks v. United States, 437 U.S. 1, 15 (1978)).

Here, the stolen property seized from the defendant's residence and the testimony of the co-defendant are sufficient to support the convictions. The convictions are reversed because the evidence seized from the defendant's residence was erroneously received into evidence and should have been suppressed. Pursuant to Longstreet, however, the state may retry the defendant.

Accordingly, the judgments of the trial court are reversed and the cause is remanded for a new trial.

GARY R. WADE, PRESIDING JUDGE